

No. 90-90

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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

MARTIN J. HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district judge was required to disqualify herself under 28 U.S.C. 455(a).
2. Whether false statements in two required reports by a labor union to the Department of Labor were within the scope of 18 U.S.C. 1001.



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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A13, is reported at 899 F.2d 1495. The opinions of the district court, Pet. App. A14-A42, are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1990. A petition for rehearing was denied on May 21, 1990. The petition for a writ of certiorari was filed on July 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on ten counts of falsifying union records, in violation of 29 U.S.C. 439(c); two counts of aiding and assisting in the filing of false W-2 and W-3 forms with the Internal Revenue Service (Counts 33 and 34), in violation of 26 U.S.C. 7206(2); and two counts of making false statements through the submission of false labor reporting documents (Counts 36 and 37), in violation of 18 U.S.C. 1001.

Following the jury's verdict, the district court granted petitioner's motion for judgments of acquittal on the two false statement counts. It also reduced one of the two tax counts (Count 33) to a misdemeanor under 26 U.S.C. 7204. The district court sentenced petitioner to two years' probation and fined him \$10,000.¹ The court of appeals affirmed in part and reversed in part.

1. Petitioner was the district vice-president for the Communications Workers of America (CWA) and the chief executive of the CWA's District No. 4, which comprised local CWA unions in Ohio and Michigan. Petitioner ran CWA District No. 4 from a headquarters office in Rocky River, Ohio. Located in an adjoining office in the same building was the United Telephone Credit Union (UTCU)—a credit

¹ Under 29 U.S.C. 504(a), petitioner's convictions barred him from holding union office for 13 years. The district court shortened the disability period to three years, but denied petitioner's motion to stay the disability. Petitioner then filed a petition for a writ of mandamus. On January 19, 1988, the court of appeals stayed the disability pending appeal. The government filed a petition for rehearing, but the court of appeals did not rule on that petition before rendering it moot by deciding the underlying appeal on the merits.

union of which petitioner was the treasurer. Gov't C.A. Br. 5.

The evidence at trial showed that petitioner embezzled funds from the CWA to make political contributions and to supplement the salaries of UTCU employees. As a CWA officer, petitioner had access to the voucher system by which the union paid part-time employees (whether CWA members or others) for expenses incurred and wages earned in doing union work. Petitioner falsely represented on hundreds of vouchers submitted to CWA headquarters in Washington, D.C., that certain UTCU employees had incurred expenses while working part-time on CWA organizational activities. In reality, petitioner used the CWA funds to build up a political slush fund from which he made direct contributions to political candidates and paid the salaries of their campaign workers. Petitioner also used the CWA funds to supplement the salaries of some of the purported part-time CWA employees who were actually working full-time for the UTCU. As a result of the scheme, the UTCU did not have to provide those employees with various costly benefits that were due to full-time workers, and the employees avoided income taxes on the supplemental portion of their salaries provided in the guise of expense reimbursement. Gov't C.A. Br. 5-11.

Petitioner's misappropriation of union funds caused the CWA to file false reports to the Department of Labor. Under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 431, the CWA was required to file an annual LM-2 report with the Department of Labor disclosing, among other things, all of the union's disbursements, including the "salary" and "reimbursed expenses" of each employee who received

payments of more than \$10,000 during the year. 29 U.S.C. 431(b)(3). The CWA compiled that information in part from the expense vouchers, and it attached to each LM-2 report a schedule listing the employee's name along with the amount of the employee's gross salary and reimbursed expenses. Gov't C.A. Br. 11-12.

Because petitioner falsified the vouchers submitted to CWA headquarters, the reports that the union submitted to the Department of Labor were inaccurate. The LM-2 report filed by the CWA for 1982, for instance, listed Gay Griffith as a CWA employee who received \$7,995 as reimbursement for expenses. The CWA's LM-2 report for 1983 likewise showed Griffith as an employee who received \$10,540 in reimbursed expenses. Those entries were false. In fact, Griffith was the manager of the UTCU credit union and did not incur any expenses working for the CWA. Petitioner paid those amounts to Griffith from CWA funds to supplement her salary. Gov't C.A. Br. 11-12.

2. Petitioner's case was assigned to United States District Judge Ann Aldrich. Before trial, petitioner moved for Judge Aldrich's disqualification or recusal under 28 U.S.C. 144 and 455. In an affidavit supporting his motion, petitioner stated that President Carter, at petitioner's request, had signed District Judge George White's commission one day earlier than he had signed Judge Aldrich's commission. Both judges were appointed to the bench of the Northern District of Ohio.² Petitioner further averred that in a conver-

² Petitioner's affidavit stated that Judge White's appointment was signed on June 6, 1980, and Judge Aldrich's appointment was signed on June 7, 1980. In denying the motion to recuse, Judge Aldrich noted that "public records demonstrate that the commission[] of Judge White * * * [was] signed on

sation he had with Judge Aldrich in 1980, she had indicated that she held him responsible for making her tenure one day shorter than Judge White's.

Judge Aldrich denied petitioner's motion. Pet. App. A38-A42. She accepted for purposes of ruling on the motion that she "does hold [petitioner] responsible for her 'lesser seniority' than Judge White," but only "because [petitioner] advises that this is true." *Id.* at A39. Judge Aldrich nonetheless found that "it is not likely that any 'reasonable person' would perceive 'lesser seniority' as of any significant consequence." *Ibid.* She explained that all of the judges "receive the same salary, set their own hours, control their own dockets, and otherwise enjoy considerable independence." *Id.* at A40. She also noted that "[p]olicy decisions for the court are made by majority vote, and each vote, including that of the chief judge, counts for one"; the position of chief judge, she explained, is "largely 'ceremonial and administrative.'" *Ibid.* Since two other active judges in the district have more seniority than either Judge Aldrich or Judge White, she observed that "no reasonable person could perceive Judge White's 'greater seniority' as having anything more than a remote effect on the improbable conglomeration of contingencies that would have to occur for [her] to ever serve as chief judge." *Ibid.*

In response to petitioner's motion to reconsider, Judge Aldrich elaborated on her reasons for declining to disqualify or recuse herself. Pet. App. A29-A37. To begin with, she rejected petitioner's claim that the sufficiency of his affidavit to support disqualification under 28 U.S.C. 144 should have been decided

May 23, 1980," while her commission was signed on May 24, 1980. Pet. App. A39 n.1.

by another judge. Pet. App. A31-A35. She also pointed out that petitioner had failed to satisfy the procedural requirements of Section 144, because "counsel for [petitioner] has not filed a certificate stating that [petitioner's] affidavit is made in good faith." *Id.* at A36.

Judge Aldrich next addressed the statement in petitioner's affidavit in which he alleged that during a chance encounter in September 1980 she told him that she held him responsible for her lesser seniority. Pet. App. A36-A37. Judge Aldrich recognized that she "was required to accept the averment regarding 'responsibility' as true for the purposes of evaluating the affidavit under § 144." *Id.* at A36. She "construed the word 'responsible' to mean that [she] accepted [petitioner's] indication that he was the cause of Judge White's 'greater seniority'" and "did not understand the word to be fraught with negative implications." *Ibid.* She also reaffirmed her conclusion that "the value of seniority in this district is negligible for a reasonable person to believe that [I] could not be impartial to [petitioner]." *Ibid.*

Judge Aldrich noted that, in contrast to 28 U.S.C. 144, "[28 U.S.C.] § 455 does not require the Court to accept allegations of the affidavit as true." Pet. App. A37 n.2. But she found it "unnecessary to dispute any material allegations of [petitioner's] affidavit." *Ibid.* Placing her statement in the context of the conversation initiated by petitioner, Judge Aldrich reiterated that her "statement regarding 'responsibility' [did not] indicate an attitude * * * [of] culpability." *Id.* at A37. She explained that "the act of responding to [petitioner] with such a statement does not carry the negative implications present when one purposely approaches an individual to inform him or her of his or her 'responsibility,'" but rather was

“a normal reaction indicating belief in what has just been stated.” *Ibid.*

3. After the jury returned its guilty verdict, the district court acquitted petitioner on the two false statement counts based on the LM-2 annual reports filed by the CWA for 1982 and 1983 (Counts 36 and 37). The court concluded that the statements in those reports, although false, were not material. Pet. App. A14-A28. The court noted that “[t]he total amount paid to Gay Griffith was correctly reported on the LM-2’s; what was incorrect was the break-down between wages and expenses.” *Id.* at A25. That discrepancy, the court explained, had no effect on any determinations of the Department of Labor because the purpose of the forms was “to call attention to those individuals who were being paid by more than one union and to ‘adequately describe’ the total amount each employee was paid.” *Id.* at A25-A26. The court also stated that “[t]he amounts by which the LM’s were false was extremely small” in proportion to the amounts reported on the forms. *Id.* at A26. Finally, the court observed that 29 U.S.C. 439 makes it a separate misdemeanor to make false statements on any matter required to be reported under the Labor Management Reporting and Disclosure Act. The district court concluded that its “earlier concerns about finding immaterial the making of a false statement which Congress has required [in the LM-2 annual reports] is allayed by Congress’ providing the lesser penalty for the making of a false statement under the LMRDA.” Pet. App. A27.

4. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A13. It affirmed the district court’s denial of petitioner’s disqualification/recusal motion under 28 U.S.C. 144 and 455. Pet. App.

A11-A12. Relying on *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the court of appeals found it "quite clear that under the circumstances of this case, a reasonable, objective person, knowing all the circumstances, would not have questioned Judge Aldrich's impartiality." Pet. App. A12.

The court of appeals reversed the order granting a judgment of acquittal on the two false statement counts. The court held that the district court erred in ruling that the false statements in the LM-2 annual reports filed by the CWA for 1982 and 1983 were not "material" for purposes of 18 U.S.C. 1001. Pet. App. A4-A8. It explained that "a false statement to a federal agency is material even if it does not actually influence a decision of the agency, so long as it has a natural tendency to influence or is capable of influencing a decision of the agency." *Id.* at A5. Since the false statements in this case concerned information specifically required to be disclosed by the statute as well as the LM-2 form, the court concluded that the false statements were "clearly of the type capable of influencing the Department of Labor's information-gathering and regulatory decision-making process." *Id.* at A7.

ARGUMENT

1. Petitioner renews his contention that Judge Aldrich was required to disqualify herself under 28 U.S.C. 455(a) because a reasonable person might question her impartiality. Pet. 7-11.

Petitioner does not dispute that the court of appeals applied the correct legal standard in determining whether Judge Aldrich was required to disqualify herself under Section 455(a). Like the court of appeals, petitioner relies on *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), for the proposition that the standard for deciding the recusal motion is how a reasonable person would view the judge's impartiality.

Petitioner's principal contention is that a reasonable person would question Judge Aldrich's impartiality because the significance of her "lesser seniority" involved the internal workings of the court system that would not be readily apparent to an average layperson. *Liljeberg* makes clear, however, that a judge is required to disqualify herself under Section 455(a) only "if a reasonable person, *knowing all the circumstances*," would question the judge's impartiality. 486 U.S. at 861 (emphasis added). Applying that objective standard here, the court of appeals properly evaluated petitioner's claim from the perspective of a reasonable person who knew what consequences followed from Judge Aldrich's "lesser seniority."

As the court of appeals explained, "[t]he 'benefits' of which Judge Aldrich was supposedly deprived by her lesser seniority are, in the case at hand, truly de minimis based upon the evidence presented." Pet. App. A12. The court of appeals pointed out that "it is quite implausible that either Judge White or

Judge Aldrich would ever become chief judge, with whatever perquisites that might imply," and "[t]here is not the slightest hint that whatever precedence has existed in items such as office selection, etc., has been of any significance either in fact, or in the estimation of either judge." *Ibid.* Given the "marginal nature of the benefits that a judge receives by having greater seniority," the court of appeals was plainly correct to conclude that "a reasonable, objective person, knowing all the circumstances, would not have questioned Judge Aldrich's impartiality." *Ibid.* Petitioner's fact-bound claim to the contrary does not warrant further review.

Petitioner relies on three circumstances to support his claim that a reasonable person would question Judge Aldrich's impartiality based on her statement that she held petitioner responsible for her lesser seniority. First, petitioner points to the government's observation, made in a memorandum filed after Judge Aldrich initially denied the motion to recuse, that her statement carried "heavy implications of intolerance." Pet. 9. In that memorandum, however, the government merely asked Judge Aldrich to address petitioner's allegation that she had made the statement and urged Judge Aldrich to clarify on the record her reasons for denying petitioner's motion. Pet. App. A35-A37; Gov't C.A. Reply Br. 7-8.

Second, petitioner relies on the fact that Judge Aldrich did not allow the government to cross-examine Judge White, who testified as a character witness for petitioner at trial, about his role in securing Judge White's appointment. Pet. 9. That ruling could hardly show bias *against* petitioner, since the ruling was in his favor. The government's proposed cross-examination was designed to show that Judge White might be biased in favor of peti-

tioner. Judge Aldrich exercised her discretion under Federal Rule of Evidence 403 to exclude that inquiry because it might confuse the jury and divert its attention from the issues at trial. Pet. App. A53-A56. It does not follow from that ruling that a reasonable person would have questioned Judge Aldrich's impartiality or would have concluded that she bore any animus toward petitioner. Gov't C.A. Reply Br. 8-9.

Finally, petitioner relies on the fact that he took all steps available to him to have Judge Aldrich recused by filing a petition for a writ of mandamus after Judge Aldrich denied his motion to recuse. Pet. 10. Petitioner's pursuant of his motion to recuse, however, merely demonstrates that he questioned Judge Aldrich's impartiality, not that a reasonable person would.⁵

2. Petitioner also contends that the court of appeals misconstrued the materiality requirement of 18 U.S.C. 1001 when it reinstated his convictions on the two false statement counts. Pet. 12-16.

⁵ Petitioner notes in passing that the courts of appeals disagree about whether the denial of a recusal motion must be reviewed immediately by writ of mandamus (as the Seventh Circuit holds) or instead may be addressed upon appeal from a final judgment (as the Sixth Circuit holds). See Pet. 10-11 n.3.

That issue has no bearing on this case. Petitioner challenges only "the standard to be applied in determining whether a trial judge should recuse herself pursuant to 28 U.S.C. § 455(a)," Pet. i, not whether the court of appeals should have granted his petition for a writ of mandamus. Moreover, petitioner was not prejudiced by the difference in timing, because the court of appeals reviewed his objection to Judge Aldrich on appeal from his final judgment of conviction. This case is therefore quite different from one in which an objection to a district judge is not reviewed on the merits because the defendant neglected to seek mandamus prior to trial.

It is well settled that a false statement is "material" under Section 1001 if it has a natural tendency to influence or is capable of influencing a decision of a governmental agency. See *Kungys v. United States*, 485 U.S. 759, 769-770 (1988); *United States v. Corsino*, 812 F.2d 26, 30-31 (1st Cir. 1987) (collecting cases). Applying that standard here, the court of appeals correctly concluded that the false statements concerning the payments to Gay Griffith in the LM-2 annual reports filed by the CWA for 1982 and 1983 were "material." The Labor-Management Reporting and Disclosure Act was designed to protect workers from labor and management abuses through the required filing of detailed reports. The false statements on the LM-2 annual reports directly affected the Department of Labor's ability to carry out its responsibility of assuring full disclosure of the CWA's financial operations and of detecting and preventing union payroll abuses. When an employee's wages are falsely reported as expenses, the Department of Labor gets a false picture of that employee's earnings, the amount of time he is spending at that job, and the nature of the payments. As a result, such false statements directly impede the Department's ability to monitor union activity for payroll padding, ghost employees, and other payroll abuses. Gov't C.A. Br. 13-23. The court of appeals therefore properly concluded that the false statements on the LM-2 annual reports were "clearly of the type capable of influencing the Department of Labor's information-gathering and regulatory decision-making process." Pet. App. A7.⁴

⁴ The court of appeals' determination that the reports were "capable of influencing" the agency's decision making process flatly contradicts petitioner's contention that "the court of

There is no merit in petitioner's contention, Pet. 13-14, that Section 1001 should be narrowly construed to exclude false statements such as the ones in this case from its coverage. Section 1001 was designed to protect "the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" in the statute. *United States v. Gilliland*, 312 U.S. 86, 93 (1941). By its plain terms, Section 1001 reaches "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." This Court has consistently declined to restrict the broad scope of that language. See *United States v. Yermian*, 468 U.S. 63, 74-75 (1984); *United States v. Rodgers*, 466 U.S. 475, 484 (1984); *United States v. Bramblett*, 348 U.S. 503, 509-510 (1955).⁵ By its terms, the statute is plainly broad enough to cover false statements of

appeals found that the request for information was enough to make it material." Pet. 14.

Petitioner responds to the phrase quoted in the text by saying that "the general 'type' of information, standing alone, does not prove materiality." Pet. 16. To the extent petitioner suggests that the "type" of information must be capable of influencing an agency's decision-making, he is correct and the court of appeals so held. To the extent petitioner suggests that the false statement must actually influence an agency, his suggestion is contrary to the decisions of numerous courts of appeals, p. 12, *supra*, as petitioner himself acknowledges earlier in his petition, see Pet. 14.

⁵ Petitioner relies, Pet. 13, on *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967), to support his contention, but in *United States v. Rodgers*, *supra*, this Court squarely rejected the reasoning of the *Friedman* decision.

the sort at issue in this case, where the statements were made to a federal agency pursuant to a required reporting scheme, where petitioner was responsible for introducing the falsehoods into the reports, and where the false statements had the capacity to influence the agency in the conduct of its statutory oversight duties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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